No. 89-1296

Supreme Court, U.S.
FILED
JUN 8 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

OKLAHOMA NATURAL GAS COMPANY,
Petitioner,
v.
WILLIAMS NATURAL GAS COMPANY,
SMITH COGENERATION INC.,
POWERSMITH COGENERATION PROJECT
LIMITED PARTNERSHIP, and CITY OF OKLAHOMA CITY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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RESPONSE OF PETITIONER TO THE SOLICITOR GENERAL'S AMICUS BRIEF

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The government, recommending against a grant of certiorari, argues that the Tenth Circuit correctly construed Section 19(b) of the Natural Gas Act to oust the state court of jurisdiction over petitioner's state law claim, so that petitioner was required, after all, to present its claim to FERC. SG Brief 9-16. The government also argues that the injunction against the state court order was, if not proper, at least "consistent with governing legal principles." SG Brief 10. The government's explanation of both points, however, merely confirms the importance of this Court's review, for the government not only proposes a quite new restriction on state court jurisdiction but fails to offer a workable standard that courts and litigants can apply to determine what forum may or may not hear particular state law claims.

1. a. We suggested in our petition that review by this Court is needed to establish a clear rule telling parties who have state law claims against holders of FERC certificates in what circumstances they must depart from the usual practice of filing such claims in state court and instead present such claims to FERC. The government, like the Tenth Circuit, rejects the clear rule supported by the statute and precedent—that state court is a proper forum for *any* state law claim, like petitioner's, that does not in fact challenge the validity of a FERC certificate. *See* Pet. 14-20. The government instead argues that a line must be drawn between different types of state law claims. It concedes that *some* state law claims against certificate holders may be brought in state court (*see* SG Brief 13-14) [1] but says, at the same time, that *other* state-law claims can be brought only before FERC. What is the difference between one type of claim and the other? According to the government, the claims to be presented to FERC are those which are regarded as the "functional equivalent" (SG Brief 10) of claims that a FERC certificate should be "set aside" or "modified" (Section 19(b))—even though, by their terms, the claims do *not* seek to modify or set aside a FERC certificate but rather to subject the certificate holder to an additional requirement under state law. With all due respect, this approach provides no line that is defensible or that gives clear guidance on the first question any litigant must answer—where to bring a claim.

As it turns out, the government itself seems to have only the vaguest idea about how to apply its new-found standard to actual claims. Its first attempt at explaining why petitioner should have brought its state law claim before FERC is simply that petitioner "sought to subject Williams' use of the FERC-approved pipeline to the state law franchise requirement and thus necessarily to prevent

[1] "Neither this Court in *City of Tacoma* nor the court below suggested that state courts are deprived of all jurisdiction to consider any claim against a certificate holder relating to authorized service." SG Brief 13-14.

Williams from operating the pipeline under the express terms of the FERC certificate. Indeed, petitioner's state law action sought to enjoin implementation of the FERC certificate by subjecting Willams' proposed pipeline to an additional state law requirement." SG Brief 10. But if that explanation defines the test, *any* attempt to prevent a certificate holder from disregarding state law is the "functional equivalent" of a petition to set aside the certificate. That standard would apply to every enforceable state law. The government offers no support for such a sweeping new rule of exclusive FERC jurisdiction, and the case law is to the contrary, recognizing that state law claims of precisely this type are properly litigated outside the Section 19(b) context. *See, e.g., Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988); *Michigan Consol. Gas Co. v. Panhandle Eastern Pipe Line Co.*, 887 F.2d 1295 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1806 (1990); *Michigan Consol. Gas Co. v. FERC*, 883 F.2d 117, 122 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 1807 (1990). Even Williams, in acknowledging that state environmental and safety laws apply to the certificated project (Pet. App. 89a), concedes that a claim that a certificate holder may not proceed without complying with certain state laws is not an effort to "set aside" or "modify" a certificate within the meaning of Section 19(b).

Elsewhere in its brief, the government refines its approach: it proposes a narrower, case-specific inquiry into the nature of the particular state law claim, requiring litigants "to determine whether, in the circumstances presented, the true core of the state court action constitutes a challenge to the authority granted by the certificate." SG Brief at 14. But the government then offers no guidance on how to determine whether the "true core" of a particular state law claim challenges a FERC certificate even though the claim does not purport to do so. What the government seems to have in mind is some sort of inquiry into how directly or substantially application of a particular state law would affect a certificated proj-

ect. Such a sliding-scale/balancing approach not only does little to tell litigants what they need most to know—what forums properly may hear a claim and what forums are barred from doing so[2]—but also mixes up the question of jurisdiction with the separate inquiry into whether a particular state law is preempted.[3] This Court in *Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 565 (1961), rejected just such an effort to transform a Natural Gas Act preemption defense to a state law claim—whatever the ultimate merits of that defense—into a Section 19(b) jurisdictional bar on state court adjudication of the claim.[4]

b. The government's only support for its amorphous standard is *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958). But as the government acknowledges (SG Brief 11), *Tacoma* involved an attempt to relitigate a claim in state court that, unlike petitioner's state law claim here, had actually been litigated in a prior proceeding; and the Court in *Tacoma* relied centrally on that fact. 357 U.S. at 334-39. The government suggests (SG Brief 12) that *Tacoma* went on to hold that state court

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[2] This Court has observed that "litigants ought to be able to apply a clear test to determine" whether they have brought their cases to the right court. *Heckler v. Edwards*, 465 U.S. 870, 877 (1984); *see also Budinich v. Becton Dickinson & Co.*, 108 S. Ct. 1717, 1722 (1988) (rule with jurisdictional consequences "should above all be clear").

[3] *See Northwest Central Pipeline Corp. v. Corporation Comm'n of Kansas*, 109 S. Ct. 1262 (1989) (Natural Gas Act preemption inquiry examines directness and substantiality of impact of state measure on FERC orders); *English v. General Electric Co.*, 58 U.S.L.W. 4679, 4683 (U.S. June 4, 1990) (same outside NGA context).

[4] In *Pan American*, the defendant specifically argued that a state law contract claim was in reality a claim to modify a filed rate and that, under Section 19(b), the claim therefore could not properly be brought in state court. This Court held that, whatever the merits of the preemption defense that the state law claim conflicted with a filed rate, the state court had jurisdiction over the claim because it was stated as a claim under state law and could not be judicially rewritten to be something else.

litigation of certain state law issues was barred because those issues "could and should have been" presented to the Commission (and therefore to the Section 19(b) reviewing court), whether or not they actually were so presented. 357 U.S. at 339. That suggestion simply misreads *Tacoma*. The passage quoted by the government says only that the issues in question could and should have been raised before the *court of appeals* (not the *Commission*) in the Section 19(b) proceeding (*ibid.*)—a proposition that is hardly surprising given that, as the Court had just demonstrated at great length (357 U.S. at 334-39), the issues had in fact been raised before and decided by the Commission. But contrary to the Tenth Circuit's and the government's view, *Tacoma* does *not* say that any particular state law issues must be raised before the *Commission* and not in state court.

In any event, even if *Tacoma* does require the presentation of certain state law issues to FERC, it offers no real guidance on how to distinguish state law claims that can be brought only to FERC from state law claims that may be litigated in the usual manner, *i.e.*, in state court. The government quotes (SG Brief 12) only *Tacoma*'s singularly unenlightening reference to "all issues inhering in the controversy" (357 U.S. at 336), but the government does not explain what that standard means or its relationship to the government's "true core"/"functional equivalent" standard.[5] Certainly, this Court's full con-

[5] On the assumption that *Tacoma*'s "inhering in the controversy" standard does apply to some state law issues that are not actually presented to the Commission, the standard might be understood as dependent on the command of Section 9 of the Federal Power Act that a license applicant actually place before the Commission various state law issues. That may be so even though, as the government notes (SG Brief 14-15), the Commission is not obliged to insist on compliance with any particular state laws. Contrary to the government's suggestion (SG Brief 15), the *Tacoma* Court did rely on Section 9: in crucial passages of the opinion describing what issues were before the Commission, the Court pointedly cited to Section 9. 357 U.S. at 326 n.9, 337 n.17. The government does not rely on any controversy-defining provision of the Natural Gas Act that is comparable to Section 9 of the Federal Power Act.

sideration is required before *Tacoma*'s vague language can be allowed to become the basis for a new standard funneling some class of state law issues to FERC.

c. The government's brief does no better at explaining away the intercircuit conflict, and its own prior inconsistent position, than it does at proposing a standard that sweeps some state law claims under the language of Section 19(b). The government simply ignores the D.C. Circuit's express ruling in *Michigan Consol. Gas Co. v. FERC, supra,* that the Section 19(b) proceeding there did *not* encompass a claim—identical to petitioner's claim, for present purposes—that a FERC certificate holder may not proceed with its project (as here, a local bypass) without also complying with state law. 883 F.2d at 122. The government at least tries to distinguish the Sixth Circuit's decision in *Michigan Consol. Gas Co. v. Panhandle Eastern Pipe Line Co., supra*—where the Sixth Circuit decided the claim that the D.C. Circuit had not decided—by observing that the party seeking to enforce state law against the certificate holder in that case had filed suit in state court (one day) *after* the certificate holder itself filed a declaratory judgment action raising the same issues in federal district court. SG Brief 13 n.13. But the government merely points out the distinction, without explaining (or indeed asserting) its relevance under Section 19(b). In fact, the timing of the state law claims against the certificate holder has no bearing on the scope of Section 19(b), which, in the Tenth Circuit's and government's view, should have made the jurisdiction of the D.C. Circuit exclusive and barred the Sixth Circuit from exercising jurisdiction over those claims. Yet the Sixth Circuit took jurisdiction over and decided the preemption defense to the state law claims on the merits.

The government's current view of the scope of Section 19(b) is also flatly inconsistent with the view it took in the D.C. Circuit and Sixth Circuit cases. In the D.C. Circuit case, FERC told the court that it should *not* decide whether the certificate holder must also comply with

state law, explicitly distinguishing that question from the question of FERC's jurisdiction to issue the certificate. Instead, both in the D.C. Circuit and in the Sixth Circuit, FERC specifically urged that the Sixth Circuit case, on appeal from actions filed in district court and in state court (outside Section 19(b), of course), was the proper forum for decision of the state law issue.[6] Not until its current amicus brief—neither in FERC's brief in the Tenth Circuit nor previously, to our knowledge—has the government taken the position that Section 19(b) covers not only challenges to the *validity* of a FERC certificate but also state law claims that may raise issues (in defense) as to the preemptive *effect* of a FERC certificate.

2. The government does not assert that the Tenth Circuit acted properly in requiring an injunction of the state court judgment. It goes no farther than to argue that the "largely unexplained ruling on this point" was "consistent with governing law." SG Brief 16. Even that defense of the decision below, however, is at best half-hearted and noncommittal, and it does little more than underscore that new law would have to be made if the injunction is to be upheld under an exception to the general rule that challenges to state court decisions must proceed through state appellate courts, not through collateral attacks in the federal trial and appellate courts. *See, e.g., Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988); *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 525 (1986).

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[6] FERC told the D.C. Circuit: "Although the Commission orders and petitioners addressed both the questions of Commission jurisdiction and the preemptive effect of such jurisdiction on Michigan's authority, we maintain that the preemption issue is more fully presented in No. 88-1650 (6th Cir.). Consequently, in response to inquiries by the U.S. Court of Appeals for the Sixth Circuit, we have informed that court that the preemption issue should be decided in No. 88-1650, where it has been briefed and argued. If that court decides not to reach the issue, we believe this Court should rule on the merits of [the] issue." Brief for FERC in No. 88-1062 (D.C. Cir.) at 17 n.8.

a. In defense of the Tenth Circuit's refusal to give full faith and credit to the state court's decision upholding its own jurisdiction, the government begins by apparently conceding that, under 28 U.S.C. § 1738, Oklahoma law governs the preclusive effect of the decision. But the government does not go on to argue that Oklahoma courts would decline to give preclusive effect to the decision. It says simply, and without citation to any Oklahoma cases, that "it is far from clear" that Oklahoma courts would do so. SG Brief 16. We know of no support for the surprising view that the Oklahoma courts would permit collateral relitigation of a jurisdictional question previously litigated and decided in the state courts (where there are full rights of appeal).[7]

As a secondary defense of the non-preclusion ruling, the government asserts, again without any elaboration, that issue preclusion with regard to the state court's resolution of the jurisdictional question is inapplicable because the state court judgment encroaches on exclusive federal jurisdiction under a comprehensive statutory scheme. SG Brief 16-17. But the only decisions cited by the government—*Brown v. Felsen*, 442 U.S. 127, 134-39 (1979); *Kalb v. Feuerstein*, 308 U.S. 433 (1940), both of which involved the bankruptcy scheme—are plainly inadequate support for the Tenth Circuit's refusal to give preclusive effect to the state court's decision on the issue of its own jurisdiction.[8] *Brown*, while declining to apply

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[7] Of course, it has long been the ordinary rule even under the Full Faith and Credit Clause of the Constitution that actual litigation of a court's jurisdiction precludes a later collateral attack seeking to relitigate the jurisdictional question. *See, e.g., Johnson v. Muelberger*, 340 U.S. 581 (1951); *Sherrer v. Sherrer*, 334 U.S. 343 (1948). That is likewise the ordinary rule under the Restatement (Second) of Judgments § 12 Comment c.

[8] That is so even if one puts aside questions about the meaning of those decisions in light of this Court's recent decisions applying state preclusion principles under 28 U.S.C. § 1738 in the face of claims within exclusive federal jurisdiction. *See Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985).

claim preclusion to a state court judgment, specifically noted that *issue* preclusion was different and that (at least as to factual issues) a state court's actual decision of an issue *would* preclude its relitigation in federal court even in the face of an exclusive federal jurisdictional scheme. 442 U.S. at 139 n.10. Similarly, as this Court has specifically noted, *Kalb* did not approve a federal court's refusal to apply *issue* preclusion on a jurisdictional question, because the case did not involve a prior state court resolution of the question of its own jurisdiction. *See Durfee v. Duke*, 375 U.S. 106 (1963). Unsurprisingly, leading commentators have expressly noted that even in the *Kalb* situation, where "federal law has preempted all state jurisdiction to render any judgment whatever . . . [,] litigation of the jurisdiction question in the state courts may preclude reexamination in a federal court." [9] Accordingly, new law would be required in order to justify the Tenth Circuit's second-guessing of the state court's decision on the jurisdictional question.

b. In defense of the Tenth Circuit's refusal to follow the Anti-Injunction Act's general ban on federal court injunctions against state court orders, the government's primary contention is that the injunction "appears warranted" (SG Brief 18) under the exception allowing a federal court to issue an injunction where "necessary in aid of its jurisdiction" (28 U.S.C. § 2283). The government's only argument is that the state court judgment "interfered with the purpose of [the] condemnation—to operate the pipeline." SG Brief 18. But that theory would render the Anti-Injunction Act a nullity, because it would apply to any situation in which a state court proceeding might interfere with the purpose of *any* federal court proceeding—to vindicate certain legal rights. The government fails to offer any explanation of what

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[9] 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4470, at 675 (1981) (footnotes omitted) (citing *Alleghany Corp. v. Kirby*, 340 F.2d 311, 312 n.1 (2d Cir. 1965), *cert dismissed*, 384 U.S. 28 (1966)).

distinguishes the condemnation proceeding—or of why an injunction against a state court judgment on collateral rights under a state franchise law is necessary to protect the federal court's jurisdiction to grant certain property rights to Williams.[10]

In another attempt to find a basis for the injunction, the government also states that the Tenth Circuit "may be seen as acting on behalf of the D.C. Circuit" in requiring the injunction. SG Brief 18. But the Anti-Injunction Act allows a federal court to issue an injunction only in "aid of *its* jurisdiction" (emphasis added). That language, which the government simply ignores, cannot support the injunction in this case. The Tenth Circuit is not the D.C. Circuit (*see* 28 U.S.C. § 43); and neither is the District Court for the Western District of Oklahoma, which is the court, after all, that has been directed to issue the injunction (Pet. App. 18a).

c. Finally, in defense of the Tenth Circuit's refusal to apply the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), the government merely points out that the applicability of the doctrine in the present circumstances has not been settled by this Court. SG Brief 19. The government observes that most *Younger* cases involve other than purely private litigation, but then it acknowledges that the doctrine has been applied to suits between private parties as well. SG Brief 19. It is by no means clear why the state courts' interests in enforcement of their judgments and in their normal processes for appeal of disputed rulings, and the federalism policy commanding respect for those state interests, do not fully justify application of *Younger* abstention in the present case. In any event, what standards govern abstention in circumstances like the present is obviously an open and important question (*see* Pet. 27), which the Tenth Circuit ignored.

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[10] The government "note[s] that the condemnation action had the attributes of an action in rem" (SG Brief 18 n.17), but again it offers no elaboration of the relevance of that fact. Of course, the Tenth Circuit's decision does not rely on any such rationale.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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